

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ABRAHAM THAW
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-362
Case No. 77-613

S.S.A. No.

LOS ANGELES HILTON HOTEL
(Employer)
C/o L.A.J. Miller & Associates

Employer Account No.

Office of Appeals No. NH-5642

The employer appealed from the decision of the Administrative Law Judge which held the claimant not subject to disqualification for unemployment benefits under the provisions of section 1256 of the Unemployment Insurance Code and the employer's reserve account not relieved of benefit charges under section 1032 of the code, on the ground that the claimant was discharged for reasons other than misconduct connected with his most recent work.

STATEMENT OF FACTS

The claimant was last employed for approximately seven years for the above-identified employer as a maintenance engineer. The duties of this job brought the claimant into contact with clients of the employer in that he would be called upon to set up sound equipment, repair electrical equipment in clients' rooms, and other like maintenance work. When he was employed, he received a handbook for employees which contained a dress code. As testified to by a witness for the employer, the dress code provided:

" . . . that a person should look well-kept [sic] and was [sic] neatly groomed hair and to be fresh and professional looking on the job."

During September 1974, the claimant grew a beard and permitted his hair to grow slightly over his shirt collar. Nothing was said to the claimant by his supervisor, or managerial or administrative officials employed by the employer, in regard to his beard. Occasionally, his supervisor would, in a "joking" manner, indicate to the claimant that he should get his hair cut. The claimant did get his hair cut when directed to do so by his supervisor.

On August 11, 1976, the claimant received a memorandum from the Assistant Chief Engineer which informed him that:

" . . . Management has received many complaints as to your appearance and the time has arrived for action. . . .

"As of August 23, 1976, the hair should not be longer than shirt collar length and the beard eliminated. Failure to comply will result in days off or complete dismissal."

On August 23, 1976, the employer's personnel unit issued a memorandum identified as "GROOMING, L. A. HILTON DRESS CODE." This dress code provided, among other things, that male employees would conform to the following:

- "1) NO BEARDS
- "2) A CONSERVATIVE MUSTACHE IS PERMITTED,
NO HANDLE BARS
- "3) HAIR MAY NOT BE LONGER THAN THE COLLAR
OF SHIRT"

On September 1, 1976, the claimant was called in to the employer's personnel office, and accompanying him was his supervisor as well as the manager of the hotel. The claimant during this meeting was given the alternative of shaving

off his beard or being discharged. The claimant refused to shave off his beard, and as a result his employment was terminated by the employer.

At the hearing, the employer's witness testified that management had, in fact, received complaints and management presumed the complaints were regarding the claimant because apparently the guests identified the person that they were complaining about as the claimant. There was no specific evidence as to what the complaints entailed and it is altogether possible that the only relationship the claimant's beard had to the complaints was as a method of identification and not as a complaint in regard to the beard per se.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides for the disqualification of a claimant and sections 1030 and 1032 of the code provide that an employer's reserve account may be relieved of benefit charges if it is found that the claimant was discharged for misconduct connected with his most recent work.

This claimant was discharged by this employer because he refused to shave off his beard. Thus, it is necessary to decide if the claimant's refusal constituted misconduct within the meaning of the code.

In Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P. 2d 947, the court defined misconduct as:

" . . . conduct evincing such willful or wanton disregard of the employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability . . . (but not) mere inefficiency, unsatisfactory conduct . . . inadvertencies or ordinary negligence"

This Board and the courts of California have from time to time been called upon to decide the entitlement to unemployment benefits of claimants whose unemployment resulted from their refusal to meet the grooming standards established by the employer.

In January 1970 Appeals Board Decision No. P-B-66 was issued. In that case the claimant had been employed as a service station attendant in an Oakland service station. His duties included not only selling gasoline to the employer's customers but also promoting the sale of tires, batteries, and other automobile accessories distributed by the employer. At the outset of his employment the claimant was provided with an employer's handbook which contained the following paragraph:

"Personal appearance and conduct are important. They are important for the success of both the employees and the Company. All employees should be clean shaven with their hair suitably trimmed. The uniform provided by the Company should be kept in presentable condition. Good appearance and alert, gentlemanly conduct, will display the individual's personal characteristics to best advantage. The responsibility of obtaining high standards of appearance and conduct rests with the Station Manager and can best be accomplished by example."

Also at the time of hire the claimant signed an agreement setting forth conditions of his attendance at the employer's training school. This agreement stipulated that trainees should be clean-shaven without mustache or long sideburns.

During the period of the claimant's employment he permitted his sideburns to grow below his ear lobes. Additionally, the claimant let his hair grow over his collar. When he refused to trim his sideburns or cut his hair in accordance with the employer's grooming standards he was discharged.

Evidence presented by the employer established that many customers had complained to the employer of service station attendants who had long hair and long sideburns. The employer concluded from these complaints that many of

its potential customers refused to do business with the employer's service stations because of the grooming of some of the attendants. There the Board established the following test to be applied in "hair" cases: (1) Is there in the record evidence that the wearing of long hair by the service station attendants would impair the legitimate objectives of the employer? (2) Would the employer's interest in enforcing its rule outweigh the resulting impairment of the claimant's constitutional rights? and (3) What alternatives were available to the employer short of discharging the claimant? In applying the test, the Board decided that because of the claimant's refusal to meet the grooming standards of the employer, he was discharged for misconduct connected with his work.

In October of 1970 this Board issued Appeals Board Decision No. P-B-87. That case concerned employees of a winery. While these employees did not come into direct contact with the employer's customers the employer did, for public relations reasons, conduct tours through the winery and on these tours the claimants were visible to the individuals taking part in the tours. The claimants concerned permitted their hair to grow below their shoulders. As a result the employer received several complaints from the individuals who took part in the various tours through the winery. When the claimants refused to cut their hair they were discharged. The Board again concluded that the claimants were discharged for misconduct connected with their most recent work.

Subsequent to the promulgation of these two decisions the California courts considered a series of cases dealing with the effect of personal grooming on the rights of claimants to unemployment insurance benefits.

In 1971 the Court of Appeal in Spangler v. California Unemployment Insurance Appeals Board (14 CA 3d 284, 92 Cal. Rptr 266) held that absent a showing ". . . that there was employment to be had . . . but for the voluntary failure of the petitioner to 'spruce up'" a denial of benefits could not be sustained on this fact alone. In Chambers v. California Unemployment Insurance Appeals Board (1973), 33 CA 3d 923, 109 Cal. Rptr 413, the court affirmed Spangler in a similar factual context.

In situations more directly applicable to the case at hand, the California courts have considered instances of claimants who were discharged by their employers because

they would not shave off their beards or cut their hair. In King v. California Unemployment Insurance Appeals Board (1972), 25 CA 3d 199, 101 Cal. Rptr 660, the claimant was employed as a business machine repairman dealing directly with the employer's customers. After two weeks of approved vacation, the claimant returned to work with a beard. He was told that he should shave off his beard or he would be discharged. The claimant refused to shave off his beard and his employment was terminated. When he filed for unemployment insurance compensation, he was disqualified from the receipt of benefits. The court in King concluded that the wearing of a beard is a constitutionally protected right of an individual. The court also stated:

"Our decision goes no further than to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected; we neither hold nor suggest that a bearded person has a constitutional right to a job, and we do not reach or affect a private employer's right to manage its own business. It may also be acknowledged that payment of unemployment compensation benefits to this claimant (if such result ultimately materializes) could penalize the employer herein to the extent, if any, that its 'reserve account' with the department is affected. . . . Such event, however, may be regarded as part of the price which the employer must pay for participating in an unemployment compensation system which is administered by the state and is, therefore, subject to the state's constitutional obligations; it does not mean that the employer is not free to hire and fire as it pleases."

In McCrea v. California Unemployment Insurance Appeals Board (1973), 30 CA 3d 89, 106 Cal. Rptr 159, the court considered our findings in P-B-87 cited above. The court found that the claimant was given the alternative of cutting his hair or wearing a hair net, and when the claimant refused to do either he was discharged. There, the court held that the claimant was not entitled to constitutional protection because he had been offered reasonable alternatives and refused to accept them. Consequently, he was disqualified from the receipt of unemployment insurance benefits.

A third case considered by the courts was Thornton v. Department of Human Resources Development (1973), 32 CA 3d 180, 107 Cal. Rptr 892. In that instance the claimant had worn a beard during his period of employment and was told he would be discharged unless he shaved off his beard. He requested that he be allowed to work his regular shift and defer a decision about his beard until the next day. This request was refused and the claimant was discharged. The court analyzed McCrea and King in reaching its decision. In citing King the court said:

" . . . that the wearing of a beard is symbolic conduct entitled to the constitutional protection of the First Amendment. The court pointed to the fact that the United States Supreme Court has not directly decided this issue but '[t]he decisional law of California, however, is explicit on the point: "A beard, for a man, is an expression of his personality. On the one hand it has been interpreted as a symbol of masculinity, of authority and of wisdom. On the other hand it has been interpreted as a symbol of nonconformity and rebellion. But symbols, under appropriate circumstances, merit constitutional protection. . . ." (Finot v. Pasadena City Bd. of Education (1967) 250 Cal. App. 2d 189, 201 /58 Cal. Rptr. 520/.) Finot involved the constitutional rights of a bearded public employee (a high school teacher), as distinguished from one employed in the private sector, but we perceive no essential distinction. . . ."

The Thornton opinion then went on to observe:

"Both McCrea and King are in reality applying the test articulated by the Supreme Court in Bagley v. Washington Township Hospital Dist., 65 Cal. 2d 499 /55 Cal. Rptr. 401, 421 P. 2d 409/, to determine if the government as employer could restrict First Amendment rights. The court in Bagley stated that the governmental agency, before it can restrict First Amendment rights, must demonstrate: '(1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints

outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.' (See pp. 501-502) This test was applied in Finot v. Pasadena City Bd. of Education, 250 Cal. App. 2d 189, 199 /58 Cal. Rptr 520/, where the reviewing court, after holding a school teacher possessed a constitutional right to wear a beard, turned to a consideration of the degree of protection to which this right was protected.

"Translated to the area of private employment, the Bagley test requires evidence (1) that the restraint upon the protected right rationally relates to the enhancement of the employer's business, (2) that the benefit to the employer outweighs the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available. A finding that the Bagley test was not met would not necessarily mean that the private employer could not fire the employee but would mean that the Unemployment Insurance Appeals Board would have to find that the employee was discharged because of personal action which is constitutionally protected."

Turning our attention now to the situation in the instant matter, we find that at the time this claimant was employed by the employer there were no specific rules relative to grooming. The claimant had been wearing a neatly trimmed beard for at least two years. Shortly before his employment terminated the employer established specific rules in regard to personal grooming of its employees. The claimant was ordered to shave off his beard or be discharged. While it is true that clients of the employer made some complaints about the claimant, it is not at all clear as to whether these complaints were related to the claimant's beard or whether the beard was merely used as a mark of identification. There was no indication that any of the employer's clients withdrew their business from employer's establishment because of the manner in which the claimant was groomed. Nor was there any indication that the employer offered the claimant any alternative other than employment termination.

As pointed out by the court in the Thornton opinion cited above, the Bagley test as it applies to private employment requires evidence establishing the following factors:

- (1) That the restraints upon the protective rights rationally related to the enhancement of the employer's business;
- (2) That the benefits to the employer outweigh the resulting impairment of constitutional rights;
- (3) That no alternatives less subversive of constitutional rights are available.

Thus, while we find no substantial differentiation in the test established by the Board's decision in P-B-66 from that in Bagley, it is clear that the Board is required to adhere to the standard established in Bagley for future application of the test to be applied in grooming cases.

We turn our attention then to evaluating whether the employer in the instant case met the requirements set down in Bagley. Our review of the evidence constrains us to conclude that the restraints placed upon the claimant with reference to shaving off his beard were not rationally related to the enhancement of the employer's business as there is no indication that the claimant's wearing of his neatly trimmed facial hair affected the employer's commerce. Also, the benefits to the employer did not outweigh the resulting impairment of the claimant's constitutional rights, as it is apparent in this factual matrix that the employer's sudden reversal of its long-standing rule allowing facial hair was not reasonable. It is equally evident that there were alternatives less subversive of the constitutional rights that were available to the employer, in that it could have easily moderated the severity of its edict completely disallowing beards by requiring a neatness that conformed with its other more rational grooming rules that tolerated mustaches and relatively long hair. Consequently, we must conclude that by requiring the claimant to adhere to the newly established arbitrary rule relating to beards the employer was infringing on the constitutionally protected rights of the claimant. In this posture, it is evident that the claimant was discharged for reasons other than misconduct connected with his work.

We believe that an employer may conduct his business as he sees fit and may dispense with an employee's services whenever, in the opinion of the employer and in the absence of contractual restraints, it becomes necessary to do so. However, when an employee is terminated and files a claim

for unemployment compensation it is necessary to decide whether the reasons for termination are disqualifying. Here, we are obligated to conclude that the action of the claimant in refusing to forego his constitutional rights in this factual matrix does not constitute misconduct within the meaning of the code.

DECISION

The decision of the Administrative Law Judge is affirmed. The claimant is not subject to disqualification under section 1256 of the code. The employer's reserve account is subject to charges under section 1032 of the code.

Sacramento, California, July 5, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

CARL A. BRITSCHGI

CONCURRING and DISSENTING -

Written Opinion Attached

HARRY K. GRAFE

CONCURRING AND DISSENTING OPINION

I concur in the result reached by my colleagues, that the claimant herein is not disqualified by reason of §1256 of the code. But I reach that conclusion for the reasons stated by the Administrative Law Judge in his decision, wherein he relied largely on King v. California Unemployment Insurance Appeals Board (1972), 25 Cal App 3d 199, and the rationale for which it stands.

I must dissent, however, from the imposition by my colleagues of the so-called "Bagley Test" on private employers. By the imposition of such test, the majority herein misinterpret the rule of the California Supreme Court set forth in Bagley v. Washington Township Hospital District (1966), 65 Cal 2d 499, and elongate the reach of the First Amendment to the United States Constitution beyond its plain and unambiguous language.

It is rudimentary that the First Amendment protection of freedom of expression is a restriction against government interference. The First Amendment is written in terms that "The Congress shall not . . ."; whereas the majority here recast that venerable expression of basic rights to read, "No private employer shall" That this Board's limited jurisdiction does not extend to re-writing the United States Constitution is a principle that needs no amplification. The application of First Amendment protection in cases such as that now before us was clearly and correctly set forth by the opinion of Mr. Justice Rattigan in King v. California Unemployment Insurance Appeals Board (supra). That rule was properly applied by the Administrative Law Judge in the present case. The Administrative Law Judge reached the correct result without resort to the test adopted by the majority herein. In fact, the propriety with which Administrative Law Judges have decided the so-called "beard" cases since King impels me to question the need for a new precedent decision by this Board on said subject. But if this Board cannot resist the compulsion to place its members' names to a precedent decision on said subject, it need do no more than set forth the Court of Appeal opinion in King.

In speaking for the court in King, Mr. Justice Rattigan was careful at the outset to draw the distinction (missed by the majority, here) that the assertion of constitutional protection to beard wearers was not directed toward the discharge by the employer, but was

aimed at the government's action in withholding unemployment insurance benefits:

"We first note that claimant is not challenging the reasonableness or validity of his discharge by the employer; he is advancing his constitutional argument only as to the state's action in denying him unemployment compensation benefits. A similar contention was made in Sherbert v. Verner (1962) 374 U.S. 398, where the claimant of unemployment compensation benefits, a member of the Seventh-Day Adventist Church, had been discharged by her employer because she would not work on her faith's Sabbath Day. (Id., at p. 399) Having been unable to obtain other employment for the same reason, she filed a claim for unemployment compensation benefits pursuant to the relevant law of her state (South Carolina). (Id., at pp. 399-400. The claim was denied, both administratively and judicially, under a provision of state law disqualifying insured workers who failed, 'without good cause . . . to accept . . . suitable work when offered . . .' (Id., at pp. 400-401)

"Reversing the South Carolina court, the United States Supreme Court held that the disqualifying provision of state law was constitutionally defective, as it pertained to the claimant, because it operated to infringe upon her First Amendment right to free exercise of religion (Sherbert v. Verner, supra, 374 U.S. 398 at pp. 402-405) and that no 'compelling state interest' had been shown which would justify such infringement." (Id., at pp. 406-410) (25 Cal App 3d at 204; emphasis added.)

The court then noted that, whereas Sherbert v. Verner had involved freedom of religion, which is expressly protected by the First Amendment, the pivotal question in King was whether the wearing of a beard merits similar protection under the aegis of the First Amendment's protection of freedom of speech and expression. After examining conflicting views in other jurisdictions, the court pointed out:

"The decisional law of California, however, is explicit on the point: 'A beard, for a man, is an expression of his personality. On the one hand it has been interpreted as a symbol of masculinity, of authority and of wisdom. On the other hand it has been interpreted as a symbol of non-conformity and rebellion. But symbols, under appropriate circumstances, merit constitutional protection. [Citation] (Finot v. Pasadena City Bd. of Education (1967) 250 Cal. App. 2d 189, 201. Finot involved the constitutional rights of a bearded public employee (a high school teacher), as distinguished from one employed in the private sector, but we perceive no essential distinction." (25 Cal. App. 3d at 205)

The last sentence of that quotation needs examination, as it appears that the majority in the case now before us (and another division of the Court of Appeal in Thornton v. Department of Human Resources Development (1973), 32 Cal App 3d 180) have taken that language out of the context used by the King court. I submit that a reading of the court's opinion in King reveals that the lack of essential distinction whether the beard-wearer is a public employee or private employee refers to the protection against infringement of his constitutional right by state action in denying him unemployment insurance benefits, as is seen from the quotation, supra, from page 204 of the court's opinion. But the language on page 205 in King does not mean that the "Bagley Test" applies to private employers, as the majority herein erroneously assert.

The court in King next proceeded to establish what, I believe, is the proper test to be applied in a case such as the matter now before us:

"As Sherbert and Finot control this case for the reasons just stated, the terminal question is whether 'compelling state interest' has been shown which 'justifies the substantial infringement of . . . [claimant's] . . . First Amendment right.' (Sherbert v. Verner, supra, 374 U.S. 398 at p. 406.) The test of such showing involves considering (1) whether the state and the administration of its unemployment compensation law would be adversely affected if benefits were to be granted and (2), if that possibility exists, whether the state has demonstrated that no conceivable alternatives would preclude the adverse

results without 'infringing First Amendment rights.' (Id., at pp. 407-408; Finot v. Pasadena City Bd. of Education, supra, 250 Cal. App. 2d 189 at pp. 199-200.)" (25 Cal. App. 3d at 206)

It is important to observe that the King court retained the proper constitutional perspective of directing its focus to the action by the state in denying benefits to the beard-wearing claimant, and not in attempting to extend the First Amendment to private employers. The court made this distinction doubly clear by stating:

"Our decision goes no further than to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected; we neither hold nor suggest that a bearded person has a constitutional right to a job, and we do not reach or affect a private employer's right to manage its own business. It may also be acknowledged that payment of unemployment compensation benefits to this claimant (if such result ultimately materializes) could penalize the employer herein to the extent, if any, that its 'reserve account' with the department is affected. (See, e.g., § 1026 et seq.) (footnote omitted) Such event, however, may be regarded as part of the price which the employer must pay for participating in an unemployment compensation system which is administered by the state and is, therefore, subject to the state's constitutional obligations; it does not mean that the employer is not free to hire and fire as it pleases. (25 Cal App 3d at 206-207)

The King decision itself is abundantly persuasive authority that the proposition offered by the majority herein is erroneous. Moreover, a careful reading of the decision in Bagley v. Washington Township Hospital District (supra) discloses that said case is incontestible authority that the test formulated therein is to be limited to government employees and not extended to the private sector, as the majority herein assert.

First, it is a well established principle of law that government employment may be conditioned and government employees may be regulated by measures not applicable to the labor force in the private sector. Thus, restrictions on political activity (the federal Hatch Act), time off for religious worship (Mandel v. Hodges (1976), 54 Cal App 3d 596), and other activities unfettered in private employment, are circumscribed or prohibited entirely as to those who choose government employment (see e.g. Van Alstyne, The Constitutional Rights of Public Employees (1969), 16 UCLA Law Review 751; Linde, Constitutional Rights in the Public Sector (1965), 40 Washington Law Review 10; Powell, The Right to Work for the State (1916), 16 Columbia Law Review 99).

A decade ago, the California Supreme Court wrestled with the issue of restraints imposed on political activities of public employees who were not subject to the federal Hatch Act. In 1964, the court decided in Fort v. Civil Service Commission (61 Cal 2d 331) that only "compelling" public interest could justify restraints in such cases and that the restrictions must not be "broader than are required to preserve the efficiency and integrity of the public service." Two years later in Bagley, the court was called upon to adjudicate a challenge of the hospital district's policy encompassed in its directive, "Political Activities of Public Employees" (emphasis added). The directive was prepared under authority contained in Government Code § 3205, which itself set forth limitations on political activities of civil service employees of local government.

From beginning to end and at all points in between, the court made it abundantly clear that Bagley was a case relating to the rights of government employees. Nowhere in the court's decision is it even remotely hinted that the case relates to the private sector. For example, at pages 503-504, the court in Bagley notes: "Although an individual can claim no constitutional right to obtain public employment or to receive any other publicly conferred benefit, the government cannot condition admission to such employment or receipt of such benefits upon any terms that it may choose to impose." Again, at pages 507-508 the court stated:

"The public employee surely enjoys the status of a person protected by constitutional right. Public employment does not deprive him of constitutional protection. In the absence of an imperative necessity to protect the public

from irresponsible activity of so serious a nature that it would disrupt the public welfare, such protections are not subject to destruction by a public employer's insistence that they be waived by contract.

"We recognized and applied these principles in our recent decision in Fort v. Civil Service Com., supra, 61 Cal. 2d 331, holding that only 'compelling' public interests can justify a governmental entity in demanding a waiver of constitutional rights as a condition of public employment. 'Although . . . one employed in public service does not have a constitutional right to such employment [citation] it is settled that a person cannot properly be barred or removed from public employment arbitrarily or in disregard of his constitutional rights.' (61 Cal. 2d 331, 334.) (footnote omitted) We further noted in Fort, 'The principles set forth in the recent decisions do not admit of wholesale restrictions on political activities merely because the persons affected are public employees, particularly when it is considered that there are millions of such persons. It must appear that restrictions imposed by a governmental entity are not broader than are required to preserve the efficiency and integrity of its public service.' (61 Cal. 2d at pp. 337-338 (italics added); see also Kinnear v. City & County of San Francisco (1964) 61 Cal. 2d 341, 343)"

In Fort the court had ruled that the state may constitutionally restrict the freedom of a public employee to run for office against or campaign against his own superior (which, I submit, is light years apart from any restrictions applicable to private employment). In Bagley the court found that the hospital district's directive prohibited far more activity than had been held permissible by Fort.

"The overbreadth of the statute lies in the wide swath of its prohibition of employee participation in a number and variety of elections. Subject to an exception for persons 'exempt' from civil service, the statute provides that no employee of a 'local agency'

may participate in 'any campaign for or against any candidate, except himself, for an office of such local agency.' Since Government Code section 3201 defines 'local agency' as 'a county, city, city and county, political subdivision, district or municipal corporation,' the ban of section 3205 would, for example, prevent an employee of a city from participating in the campaign of any officer of his city, and perhaps even his county, however remote might be the working relationship between such employee and such officer. So broad a rule cannot find justification in our dictum that a public employee may constitutionally be prevented from opposing the reelection of 'his own superior.'" (65 Cal 2d at 509)

Finally, the Bagley court was required to consider the question whether the plaintiff's status was that of a government employee falling within the proscription of Government Code § 3205 and the district directive.

"We turn, finally, to the suggestion that the statute does not apply to a public employee, such as plaintiff, who does not enjoy the benefit of a civil service or merit system. The statutory ban here expressly extends only to public employees who are 'not exempt from the operation of a civil service personnel or merit system.' Accordingly, the argument runs, the employees of a government agency which, like the present defendant, has instituted no civil service or merit system for its employees are thereby rendered 'exempt from' the operation of such a system within the meaning of the statute.

"If there were no other guide to the meaning of this phrase, we might well conclude that the statutory ban applies only to persons who enjoy the protection of a civil service or merit system and that the Legislature intended to preserve intact the political freedom of all other public employees as a surrogate for the job security which they lack. We note, however, that article XXIV, section 4, of our Constitution sets forth an extensive list of 'Offices and Employments Exempt From Civil Service.' For the most part, these positions

are elective or high appointive offices whose holders could not reasonably be expected to refrain from political activities without profoundly affecting the workings of our representative institutions. Since the Constitution has made explicit by definition the officers who are 'exempt from civil service,' we cannot at will vastly expand that category.

"The purpose of the Legislature in confining the ban of Government Code section 3205 to persons 'not exempt from' a civil service or merit system was to exclude only persons affirmatively exempted from the operation of such a system by its own terms or by the terms of statutory or constitutional law. Thus the failure of the defendant district to institute a civil service or merit system for its employees does not excuse them from compliance with Government Code section 3205, if that provision were otherwise valid." (65 Cal 2d at 510)

I laboriously cite to the reader the foregoing large portions of the court's opinion in Bagley to emphasize the context in which the court set forth its test. When viewed in that context, as the court intended that it must be, the conclusion appears inescapable that the test was designed only for the determination whether governmental action toward public employees in the matter of political restraints comports with the court's conception of constitutional rights. In fact, the test itself so states:

" . . . we hold that a governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available." (65 Cal 2d at 501-502; emphasis added)

It is thus apparent beyond dispute that the majority in the case presently before us have chosen, with a total absence of authority to support their action, to impose upon the private sector of this state a test having no rational relation to any activity by that sector (or its employees), and to create a constitutional prohibition against the private sector which was never envisioned by those fine minds who drafted our fundamental law. With such excessive reach of power I cannot agree.

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

I not only disagree with the conclusions reached in the proceedings below, I also cannot concur in the sweeping language used by the majority members of this Board in expressing the rationale set forth. It would appear that the creation of another layer of confusion is not necessary relative to this subject matter.

Reasonable grooming requirements to enhance the public image of an employer who is committed to the good will of the public have long been recognized, and I believe that the establishment of such reasonable rules is properly a prerogative of management which should not be fettered or otherwise restricted by this Board.

In McCrae v. California Unemployment Insurance Appeals Board (1973), 30 Cal. App. 3d 89, 106 Cal. Rptr. 159, the court itself recognized that an employer need not necessarily rely upon tangible proof of detriment after the fact. Any indication of ill will is sufficient to constitute detriment. In Thornton, cited not only in the majority opinion but in Mr. Grafe's dissenting opinion, this language of McCrae was recognized. It was also pointed out that an employer may very well establish reasonable rules for the conduct of his business and if such rules reasonably relate to the proper conduct of such business, an employee may be expected to comply.

Considerable emphasis has been placed upon Bagley v. Washington Township Hospital District (1966), 65 Cal. 2d 499, 55 Cal. Rptr. 401. It must be noted that the extreme limitations placed upon an employer as against an employee relate to a governmental entity. A comparable conclusion was reached in Finot v. Pasadena City Board of Education (1967), 250 Cal. App. 2d 189, 58 Cal. Rptr. 520, a case involving a high school teacher, also a public employee.

The Thornton case recognized from the discussion set forth in King v. California Unemployment Insurance Appeals Board, 25 Cal. App. 3d 199, 101 Cal. Rptr. 660 and McCrae v. California Unemployment Insurance Appeals Board (1973), 30 Cal. App. 3d 89, 106 Cal. Rptr. 159 that

the tests established in the Bagley case would logically extend to employment in the private sector. It was also pointed out, however, that a private employer could avoid the imposition of charges if the test set forth in Bagley were met; specifically, that the restraint upon the protected right would rationally relate to the enhancement of the employer's business; that the benefit to the employer would outweigh the impairment of an employee's constitutional rights and that no other alternatives less subversive of such constitutional rights were available.

I am aware of the discussions of the courts in those decisions relating to discharges for violation of an employer's grooming requirements. I am also aware, however, that the constitutionally protected rights of appearance were similarly discussed in Spangler v. California Unemployment Insurance Appeals Board (1971), 14 Cal. App. 3d 284, 92 Cal. Rptr. 266 and in Chambers v. California Unemployment Insurance Appeals Board (1973), 33 Cal. App. 3d 923; 109 Cal. Rptr. 413. In Spangler the court stated as follows:

"No one disputes the appellant's /Spangler's/ right in the context of this controversy to dress and groom himself as he pleases. No constitutional issue is involved here. Public employment is not involved. But appellant has no constitutional right to unemployment compensation paid by former employers if his sartorial eccentricities or sloppy grooming chill his employment prospects, and he voluntarily refuses reasonable accommodation to meet the demands of the labor market. This principle has been considered authoritatively before." (citations omitted)

In Chambers, supra, the following language may be found:

"The right of one to wear his hair and beard as he chooses is a 'liberty' protected by due process clauses of the state and federal Constitutions, and 'although probably not within the literal scope of the First Amendment itself' is nevertheless entitled to its 'peripheral protection.' (citations omitted)

"And, as contended by Chambers, only a 'compelling state interest' will justify a substantial infringement of such a constitutional right." (citations omitted)

It had been urged that the state had no legitimate or compelling interest in requiring an applicant for unemployment benefits keep himself available for work where it would inhibit his First Amendment rights to appear as he chose. The court went on to state:

"We observe no substantial distinction between an unemployed person who for one reason or another voluntarily renders himself unavailable for work, and another who refuses work when it is offered. In each case the unemployed person has a clear constitutional right to do, or not to do, as he has chosen. But few would argue that the exercise of one's right not to work, somehow creates a constitutional right to unemployment relief.

"Essential to the integrity of California's unemployment relief program is the requirement that unemployed persons, when possible, render themselves available for work, for otherwise benefits would be paid to those who could be working, but choose not to, thus defeating the fundamental purpose of the statute.

"We are therefore impelled to, and do, hold that California has a 'compelling state interest' in requiring that one seeking unemployment relief shall keep himself available for employment. It follows that such 'peripheral' First Amendment or other right as Chambers may have to retain his selected hair styling must in the public interest, if he wishes unemployment benefits, yield to the dictate of Unemployment Insurance Code section 1253, subdivision (c).

"We are assisted to this conclusion by language of United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678, 20 L. Ed. 2d 672, as follows: 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever a person engaging in the conduct intends thereby to express an idea'; and by the case of Spangler v. Unemp. Ins. App. Bd., supra, 14 Cal. App. 3d 284, 287, 92 Cal. Rptr. 266, 267, where in a problem closely analogous to ours, the court said:

"'No one disputes the appellant's right in the context of this controversy to dress and groom himself as he pleases. No constitutional issue is involved here. Public employment is not involved. But appellant has no constitutional right to unemployment compensation paid by former employers if his sartorial eccentricities or sloppy grooming chill his employment prospects, and he voluntarily refuses reasonable accommodation to meet the demands of the labor market.'"

As I view the basic issue, it becomes a question of the survival of a business as compared with the alleged constitutional rights of an individual employee. The opinion set forth by the majority does not consider such alternatives. It does not equally balance the rights and obligations of the claimant and the employer. Consequently, I find it objectionable, and for such reason I cannot concur.

CARL A. BRITSCHGI